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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. AARON ROJAS SILVA, Defendant and Appellant.	C083896 (Super. Ct. No. STKCRFE20160008350)

A jury convicted Aaron Rojas Silva of sexual offenses against two minors. The trial court sentenced him to nine years eight months plus 15 years to life.

Defendant now contends (1) the trial court erred in instructing the jury that it could consider defendant's false statements to police as evidence of consciousness of guilt, (2) it was also error to instruct the jury that sexual penetration of a child 10 years of age or younger is a general intent crime, (3) the trial court should not have imposed the upper term on the count 3 conviction for committing a lewd and lascivious act because the aggravating factors cited were not supported by substantial evidence, and (4) the abstract of judgment must be corrected to properly reflect the count 2 conviction for sexual penetration.

We will affirm the judgment and direct the trial court to correct the abstract of judgment.

BACKGROUND

A

While dating B.B. in 2011, defendant moved in with B.B. and her daughters, 11-year-old Al. and 9-year-old Ad.

One time when defendant and Ad. were watching television alone, defendant pulled his penis out of his boxers, rubbed it against a blanket, and put Ad.'s hand on his penis. Another time when B.B. was not at home and Al. was in another room watching television, defendant used his finger or thumb to "rim" Ad.'s anus and then inserted his finger or thumb inside Ad.'s anus. He stopped and then reinserted his thumb or finger in Ad.'s anus. The touching occurred for 10 minutes. On another occasion, defendant touched Ad.'s thigh when he was alone in a car with her, but Ad. stopped defendant's hand from going further.

There was also a time when defendant touched Ad.'s vagina. He came home drunk and B.B. had locked her bedroom door. Defendant touched Ad.'s vagina over her clothes and then under her clothes as Ad. pretended to sleep. Ad. woke Al. up after defendant left the bedroom and told her what had happened because she was scared. Ad. was crying and upset. Al. subsequently reported the information to another family member. A sheriff's deputy interviewed Ad. in 2011 but it appears no charges were brought against defendant until 2016.

B

In June 2016, 15-year-old M. hung out with her best friend S. S.'s mother left the girls in defendant's care that night. The girls went to sleep on defendant's bed but M. woke up around 4:00 a.m. when she felt defendant kissing her and touching her crotch over her clothes. When defendant went to the bathroom, M. told S. something had just happened to her. M. also texted her parents about the incident. When the police arrived,

defendant gave a false name and date of birth when a police officer asked for his identifying information.

C

At trial, defendant denied committing the sexual acts described by Ad., and he denied touching M. He said he gave the police officer a different name because he knew there was a bench warrant for him relating to a DUI. There was evidence that defendant had an infection on his penis at the time of his arrest; he said he was unable to have an erection and he did not have sex because of pain.

The jury convicted defendant of committing a lewd and lascivious act upon M. (Pen. Code, § 288, subd. (c)(1) -- on count 1),[1] sexual penetration of Ad., a child 10 years of age or younger (§ 288.7, subd. (b) -- count 2), committing a lewd and lascivious act upon Ad. by touching her vagina (§ 288, subd. (a) -- count 3), and the lesser offense of an attempted lewd and lascivious act upon Ad. (§§ 664/288, subd. (a) -- count 4). The jury could not reach a verdict on count 5 (putting Ad.'s hand on defendant's penis) and the trial court declared a mistrial as to that count. The trial court sentenced defendant to nine years eight months plus 15 years to life in prison.

DISCUSSION

I

Defendant contends the trial court erred in instructing the jury, pursuant to CALCRIM No. 362, that it could consider his false statements about his name and date of birth as evidence of consciousness of guilt. He argues the instruction was error because the false statements had nothing to do with the offense against M.

CALCRIM No. 362 provides: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false

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[1] Undesignated statutory references are to the Penal Code.

or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. [Citations.]" (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) Whether there is evidence from which a trier of fact can infer consciousness of guilt is a question of law that we independently review. (*Ibid.*; *People v. Romo* (1990) 220 Cal.App.3d 514, 519.)

The CALCRIM No. 362 instruction was supported by evidence that defendant gave false identifying information to a police officer investigating M.'s complaint against defendant. Defendant's false statements related to the charged crime because they were given during the police investigation into M.'s report against defendant. Giving the police a false name shows a consciousness of guilt. (*People v. Watkins* (2012) 55 Cal.4th 999, 1028; *People v. Liss* (1950) 35 Cal.2d 570, 576; *People v. Manson* (1976) 61 Cal.App.3d 102, 149; *People v. Bertholf* (1963) 221 Cal.App.2d 599, 602.) The trial court was not obliged to find that defendant's professed reason for providing a false name and date of birth eliminated a reasonable inference of consciousness of guilt (*Watkins*, at p. 1027), and it did not err in instructing the jury pursuant to CALCRIM No. 362.

II

Defendant next argues the trial court erred in instructing the jury that sexual penetration of a child 10 years of age or younger is a general intent crime. We agree but conclude the error was harmless.

" 'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a

general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.' [Citation.]" (*People v. Rathert* (2000) 24 Cal.4th 200, 205 (*Rathert*).) The phrases " 'with the intent that' " or " 'for the purpose of' " typically denote specific intent. (*Ibid*.)

Section 288.7, subdivision (b) criminalizes sexual penetration, as defined in section 289, by any person 18 years of age or older with a child who is 10 years of age or younger. " 'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse . . . ." (§ 289, subd. (k)(1).) Sexual penetration of a child who is 10 years of age or younger is a specific intent crime. (*People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1167-1168 (*ZarateCastillo*); *People v. Ngo* (2014) 225 Cal.App.4th 126, 157 (*Ngo*).)

The trial court instructed the jury that the crime of sexual penetration of a child who is 10 years of age or younger required general criminal intent. That instruction was incorrect. We conclude, however, that the error is harmless under any standard.

"In assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled. [Citations.]" (*People v. Tate* (2010) 49 Cal.4th 635, 696.) In making this analysis, we presume jurors are intelligent people capable of understanding and applying all jury instructions given. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940; *People v. Lewis* (2001) 26 Cal.4th 334, 390.)

The trial court told the jury that the instruction for each crime explains the intent and/or mental state required. It instructed that the jury may not convict defendant unless the People proved his guilt beyond a reasonable doubt. It further instructed that in order to prove defendant was guilty of sexual penetration with a child 10 years of age or younger the People must prove that (1) defendant engaged in an act of sexual penetration

with Ad.; (2) when defendant did so, Ad. was 10 years of age or younger; and (3) at the time of the act, defendant was at least 18 years old. The trial court defined sexual penetration for the jury: " 'Sexual penetration' means penetration, however slight, of the genital or anal opening of the other person by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification." The trial court said "penetration for sexual abuse" meant "penetration for the purpose of causing pain, injury or discomfort." Accordingly, the trial court instructed the jury on the specific intent required for the count 2 sexual penetration charge. In order to convict defendant of sexual penetration, the jury was instructed to find beyond a reasonable doubt that defendant acted for the purpose of sexual abuse, arousal, or gratification. The trial court's instructional error was harmless under these circumstances. (*ZarateCastillo, supra,* 244 Cal.App.4th at pp. 1168-1169; *Ngo, supra*, 225 Cal.App.4th at p. 163; see generally *Rathert, supra*, 24 Cal.4th at p. 205 [in general, other than cases involving a mental state defense, which is not at issue here, " ' "the characterization of a crime as one of specific intent [or general intent] has little meaningful significance in instructing a jury. The critical issue is the accurate description of the state of mind required for the particular crime." ' "].)

III

Defendant further argues the upper term sentence on the count 3 lewd and lascivious act conviction should be vacated and remanded for reconsideration because the trial court abused its discretion in relying on aggravating factors that were not supported by substantial evidence. Defendant forfeited his appellate claim by not objecting in the trial court to the challenged aggravating factors. (*People v. Scott* (1994) 9 Cal.4th 331, 353-356.)

Anticipating forfeiture, defendant asserts that his trial counsel rendered ineffective assistance by failing to object to the challenged aggravating factors. To establish ineffective assistance of counsel, defendant must prove (1) that his trial counsel's

representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*People v. Maury* (2003) 30 Cal.4th 342, 389; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 692-693].)

Here, defendant's claim of ineffective assistance fails. A single factor in aggravation is sufficient to justify imposing the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Defendant concedes that the record supports a finding that he took advantage of a position of trust. (Cal. Rules of Court, rule 4.421.) In addition, based on our review of the record, we conclude the victim was particularly vulnerable. The trial court did not abuse its discretion in imposing the upper term, defense counsel was not deficient in failing to object, and defendant has not established prejudice.

IV

Moreover, defendant contends the abstract of judgment must be corrected to properly reflect his sexual penetration conviction on count 2. The Attorney General agrees, and so do we.

Defendant was convicted on count 2 of violating section 288.7, subdivision (b). That statute makes it a felony for any person 18 years of age or older to engage in oral copulation or sexual penetration with a child who is 10 years of age or younger. Count 2 is based on the incident in which defendant placed his finger in Ad.'s anus. It is not based on oral copulation. The abstract of judgment, however, describes the count 2 conviction as "oral copulation: victim under 10 yrs of age." The abstract of judgment must be corrected to reflect the jury's verdict.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect that defendant was convicted on count 2 of sexual penetration with a child who is 10 years of age or younger, in violation of section 288.7, subdivision (b),

and not of "oral copulation: victim under 10 yrs of age." The trial court shall forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
HOCH, J.